No. 94-157

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as Personal Representative of the Estate of Kenneth J. Howard,
Petitioner,

vs.

CRYSTAL CRUISES, INC.,
a California corporation,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Death on the High Seas Act (46 U.S.C. App. § 761 *et seq.*) be read to supplant the general maritime law under *Moragne v. States Marine Lines,* 398 U.S. 375 (1970) for actions of wrongful death arising from incidents occurring aboard a foreign flag vessel while at anchor in foreign territorial waters?

2. May a survivor's income be taken into account to reduce damages for wrongful death under DOHSA and other federal statutes, or alternatively, under the general maritime law?

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OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit is reported at 41 F.3d 527 (1994), and is reproduced beginning at Appendix A-3. The unreported decision of the district court granting summary judgment on the applicability of the Death on the High Seas Act ("DOHSA") to this case is reprinted at Appendix A-12, and its decision after trial (as amended pursuant to Rule 59 [e]) is reprinted beginning at Appendix A-27.

JURISDICTION

The decision and judgment of the Court of Appeals affirming the decision of the district court was filed December 1, 1994. No petition for rehearing was filed. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

See Appendix A-1 - A-2 for the text of the Death on the High Seas Act, 46 U.S.C. App. §§ 761-767 (1992).

STATEMENT

Plaintiff and petitioner Vika L. Howard brought this action in admiralty in the United States District

Court for the Eastern District of California for the wrongful death of her husband, Kenneth Howard ("Howard"). Howard died at Sacramento, California in October 1990 of complications following a laceration to his Achilles tendon which occurred a month earlier while he was debarking the SS *Crystal Harmony* as it lay at anchor in the harbor of Zihuatanejo, in the territorial waters of Mexico. The *Crystal Harmony* is a passenger cruise ship of Bahamian registry. It is owned by a Bahamian corporation. On the date of Howard's fatal injury, it was chartered by defendant and respondent Crystal Cruises, Inc. ("Crystal"), a California corporation.

The district court granted Crystal's motion for summary judgment that the cause of action for wrongful death was governed by DOHSA, and not by the general maritime law under this Court's decision in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). However, because DOHSA lacks a survival provision, it allowed the companion survival action of Howard's estate to proceed under the general maritime law. Following a bench trial, and motions by both parties under Rule 59 (e), the court

entered judgment against Crystal for $378,794.

Mrs. Howard took a timely appeal from the district court's judg.nent. She contended that the district court erred in applying DOHSA rather than the general maritime law to her wrongful death claim. She also claimed the district court had violated the collateral source rule in taking into account her own wage earnings in calculating Howard's personal consumption to be deducted from the wrongful death award to her, and in reducing the award for lost services to account for Howard's own consumption of those services.

The Ninth Circuit affirmed the decision of the District Court. It did not address petitioner's issues of statutory construction and the appropriate reach for DOHSA in light of its legislative history. Nor did it consider the difference between DOHSA as a remedy for specified cases and the general maritime law as the law of the forum when no other statute applies. Under its reading of DOHSA, the fact that the accident took place on a foreign vessel in foreign territorial waters was irrelevant, so long as the suit was between two Americans in

an American court (41 F.3d at 530).

With regard to the collateral source issue, the court interpreted DOHSA's "pecuniary loss" standard as allowing courts to consider, in reducing damages payable by the wrongdoer, alternative means of support available to a surviving spouse.

REASONS FOR GRANTING THE WRIT

A. DOHSA Should Not Apply to This Case.

Without considering its legislative history or scope, the Ninth Circuit decided that DOHSA should apply to a wrongful death occurring aboard a Bahamian-flag vessel in Mexican territorial waters, simply because the suit was between Americans. This case involves two points about DOHSA: (1) unlike the Jones Act (46 U.S.C. App. 688 [1992]), DOHSA was *not* conceived or enacted as a general law of the forum for cases in admiralty, so that it does not apply to foreign-flag vessels operating in foreign territorial waters; and (2) under its own language, DOHSA begins and ends with the high seas, so that it could not apply to a case arising in foreign territorial

waters in any event, unless perhaps the vessel involved was registered under the flag of the United States. The decision of the Court of Appeals should be reviewed because it errs on both of these points, which are central to the body of maritime law entrusted to this Court by the Constitution.

1. DOHSA Is Not a General Law of the Forum.

DOHSA was enacted in response to a perceived gap in the admiralty law left by this Court's decision in *The Harrisburg*, 119 U.S. 199 (1886). Following accidents such as the sinking of the *Titanic*, in which large numbers of Americans who perished in disasters at sea were left without a maritime remedy in federal courts, Congress passed the final version of DOHSA in 1920, after many years of wrangling about its form and scope. One difficulty which occupied Congress was its inability to enact legislation that would cover torts occurring on foreign flag vessels while on the high seas, or elsewhere outside of American waters.

The Senate Judiciary Committee eventually proposed, and Congress subsequently passed, a new Section

4 of DOHSA (now 46 U.S.C. App. § 764), which allowed any foreign law providing a remedy "upon the high seas" to furnish a basis for a suit to be maintained under the Act. This addition, as well as numerous observations in the course of the Act's passage, show that the remedy provided in 46 U.S.C. App. § 761 was never intended to be a general law of the forum, applicable to all cases of maritime jurisdiction no matter where arising.[1]

The decision of the Court of Appeals, however, transforms DOHSA into just such a remedy, applicable in an American court of admiralty "to an action filed by an American plaintiff against an American defendant" (41 F.3d at 530). In doing so, the appellate court has supplanted, if not overruled *sub silentio*, the general maritime law of the forum declared by this Court in *Moragne v.*

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[1]*Compare* DOHSA *with* the Jones Act, 46 U.S.C. App. § 688, which for seamen is unrestricted in its territorial application, and which is construed where appropriate to apply to claims brought in American courts for negligence occurring on foreign vessels at sea or in foreign ports. *Lauritzen v. Larsen*, 345 U.S. 571, 576-81 (1953); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-10 (1970).

States Marine Lines, 398 U.S. 375 (1970). After the decision by the Court of Appeals in this case, the remedy provided by *Moragne* no longer has any application to cases in admiralty "not covered by the Act" (*Moragne,* 398 U.S. at 402), because the Act has now been construed to apply to any suit between Americans, no matter where arising or occurring, so long as it is more than three nautical miles from the shores of the United States. (State wrongful death acts usually, but not necessarily, supplant the *Moragne* remedy for accidents arising in state territorial waters.)

If this Court grants the petition for certiorari in this case, petitioner will be prepared to show, from a thorough review of the enactment of DOHSA and its subsequent history in the courts, that the statute was not intended to cover torts in foreign waters aboard foreign flag vessels. When no other remedy applies, such cases should be left to the general maritime law.

2. DOHSA's Jurisdiction Begins and Ends with the High Seas.

As a matter of statutory construction, the term "high seas" as used in the text of § 761 should be given its plain meaning. The decision of the Ninth Circuit in this case, as well as a line of decisions in other federal courts, renders the term superfluous by focusing just on the phrase: "occurring . . . beyond a marine league from the shore of any State . . .". This has changed the Death on the High Seas Act into the Death Occurring Anywhere Outside of American Territorial Waters Act, a result never intended or contemplated by Congress.

When DOHSA was first proposed, its reach extended to "the high seas, the Great Lakes, or any navigable waters *of the United States,*" as well as to any accident aboard an American-flag vessel "in *whatsoever waters such vessel may have been* at the time of the injury."[2] Legisla-

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[2]Quoted, with emphasis added, from the text of the original bill as given in G. Whitelock, "A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts," 22 Harvard L. Rev. 403, 416 n. 3 (1908).

tors from the coastal states, however, objected to any preemption of their state wrongful death remedies. The language of the bill was later changed to ensure that the territorial reach of DOHSA would begin where State wrongful death jurisdiction ceased. This language (italicized in the quotation below) appears in § 761 as eventually enacted:

> That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States,* the personal representative of the decedent may maintain a suit for damages . . .

To construe DOHSA as meant to apply in foreign territorial waters is to reject this plain history of legislative intent, and to engage in judicial legislation.

B. In Subtracting from a Death Benefit the Income of a Surviving Spouse, the Ninth Circuit Has Ignored the Requirements of DOHSA and the Collateral Source Doctrine under Maritime Law.

This part of the Petition calls upon the Court to exercise its traditional oversight of federal statutory law, here the application of legal standards for the award of

death benefits under wrongful death statutes.[3] At stake is the ability of surviving spouses in federal wrongful death cases to recover their full pecuniary losses. Petitioner submits that the Ninth Circuit, by holding that "alternative means of support available to an adult beneficiary . . . in a DOHSA action may be taken into consideration by a court," 41 F.3d at 531, undermines the statutory language of DOHSA and the collateral source doctrine as applied in maritime cases generally.

1. Congress established the measure of recovery in DOHSA cases as "fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. . . ." 42 U.S.C. App. § 762. The Court considered the pecuniary loss standard under DOHSA in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618

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[3]The issue raised in this part of the Petition implicates all those federal wrongful death statutes which have been construed to limit recovery to pecuniary damages for survivors. Among these statutes are (1) DOHSA; (2) the Jones Act, 46 U.S.C. App. § 688, as construed in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); (3) the Federal Employers' Liability Act, 45 U.S.C. § 51, as construed in *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 69-71 (1913).

(1978), and held that when Congress, through the DOHSA statute, speaks to a particular issue, the courts are not free to "supplement" Congress' decision. *Id.* at 625. The Court further stated that "The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, . . . and damages." *Id.* Petitioner submits that the lower court erred by limiting the pecuniary losses recoverable as damages.

Petitioner does not dispute that courts must deduct the decedent's personal consumption from the survivor's recovery. The Ninth Circuit took this, however, one step further. In applying the consumption factor to "total household income," the lower court subtracted the decedent's personal consumption from the surviving spouse's independently-earned income. 41 F.3d 530-31. This additional step goes beyond the standard of pecuniary loss. As the Court noted in *Higginbotham*, "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a

different class of beneficiaries." *Id.* at 626. Petitioner submits that the lower court has prescribed a different measure of damages by looking to the total household income and not the pecuniary loss of the decedent's own wages and services.

2. In including the spouse's independent income in the damage calculation, petitioner contends that the Ninth Circuit considered a collateral source. *Anheuser-Busch Inc. v. Starley*, 28 Cal.2d 347, 349, 170 P.2d 448 (1946), stated the basic contours of the collateral source doctrine:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of payment for his loss from a source wholly independent of the wrongdoer.

Id. The lower court's decision undermines the doctrine because it reduces the award based on the personal consumption of a source of income independent of the wrongdoer. In effect, the lower court's decision indemnifies the tortfeasers when the victim's surviving spouse works. This result is contrary to the shared purpose of

the collateral source doctrine and federal wrongful death statutes — to protect the right of recovery of survivors.[4] Petitioner will be prepared to argue to this Court that when determining pecuniary losses in federal wrongful death cases, the courts should not deduct the decedent's personal consumption from the spouse's income.

Petitioner submits that this case presents a novel, but not unique, issue of federal law. Dual income households have become commonplace. Federal courts will increasingly face this issue of introduction of a spouse's

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[4]Neither this Court, nor any court below prior to this case, has ever applied the personal consumption of the decedent to the total household income in determining a proper award to the surviving spouse. Supporting its unique holding, the court below relies on 16 A.L.R. Fed. 679, 725-26 (1973 & Supp.1993). 41 F.3d at 531. The cases cited thereat all relate to situations where the decedent is a child and the survivors are parents. It is undisputed that in such situations, where the courts must address the issue of whether the decedent would have continued to support the parents, the financial situation of the parents is relevant to determining pecuniary loss. The legal issue differs when the relationship between decedent and survivors differs. In the present case, the decedent and survivor were husband and wife, not parent and child.

income to mitigate the damages that tortfeasers must pay.[5] The lower court's decision will encourage defendants to shift the burden of paying for their violation of the law by looking to the survivor's income. This result subtly discriminates because it discourages survivors from working. Once defendants can introduce evidence of the spouse's income, economic experts will also start discounting for possible further education and increased earning capacity. Courts will then offset awards to formerly dual income households by the remaining, independent income. As a result of the Ninth Circuit's decision, the Congressional mandate of compensation for pecuniary loss will become irrelevant. Left unreviewed,

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[5] The courts below have not addressed the issue in regard to federal wrongful death statutes, but the issue has arisen in application of state law. See *Simpson v. United States*, 322 F.2d 688, 692 (5th Cir. 1963) (applying Texas law in a Federal Tort Claims Act action, held that to "reduce the calculation of her pecuniary loss by the amount of income which she herself can earn, . . . is normally an improper factor to take into consideration"); *Delhi-Taylor Oil Corp. v. Huebner*, 342 F.2d 418 (5th Cir. 1965) (per curiam) (diversity action) ("the trial court did not err in excluding evidence of Mrs. Huebner's earnings").

the lower court's decision could have a profound and dangerous impact on the legal standard that federal courts apply in calculating death benefits under DOHSA and a number of other federal wrongful death statutes.

CONCLUSION

The decision of the Ninth Circuit engages in judicial legislation by rewriting DOHSA to supplant the general maritime law for torts aboard foreign-flag vessels in foreign coastal waters. It also reinterprets, without precedent or analysis, DOHSA's "pecuniary loss" standard to penalize surviving spouses who earn incomes of their own, and to give wrongdoers a windfall from that collateral source. This Court is the final arbiter of admiralty law. For the reasons stated above, it should grant the Petition and issue a writ to review the decision of the Ninth Circuit.

Respectfully submitted,

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